



## Legal Update

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March 2017

***The Appeals Court holds that the Commonwealth must prove a defendant knew a firearm was loaded in order to sustain a conviction under G.L. c. 269§10 (n)!***

***Commonwealth v. Tyriek Brown***, Mass Apps. Ct. No. 16-P-67 (2017): In July 2013, a state trooper stopped Tyriek Brown, the defendant, for driving a vehicle with an inoperable tail light. The trooper arrested the defendant after he learned he had a suspended driver's license. Although the defendant had two passengers with him in the vehicle, neither possessed a valid license. The trooper determined the vehicle would be towed and while conducting an inventory search of the car, the trooper discovered a handgun in the console between the rear passenger seats. There were five bullets in the gun's magazine.

During transport to the police station by a second trooper, the defendant told that he believed the front seat passenger had a license to carry. The defendant further stated that he had obtained the gun during an incident at his former girlfriend's house prior to the stop. According the defendant, his former girlfriend's sister was waving the gun around during an argument she was having with an unknown man. The defendant disarmed the sister, and, upon returning to the car, handed the gun to the rear seat passenger (intending to dispose of it later)

The rear seat passenger told police the gun belonged to her and she used for protection because she was a victim of a violent crime. The passenger relayed that she placed the gun in the vehicle's rear console, because it made her purse heavy. The woman did not testify at the defendant's trial, but her statements about the gun were admitted as statements against penal interest.

The judge gave the model jury instructions which did not include an instruction that required the Commonwealth had to prove that the defendant knew the gun was loaded. The defendant raised no objection. During their deliberations, the jury themselves honed in on the knowledge issue, asking the judge: "Does the defendant have to know whether the firearm was loaded, or just that he possessed it and it was loaded?" After discussing the matter with counsel, the judge did not answer the jury's question directly, but he reiterated the elements that the Commonwealth had to prove without including among them knowledge that the gun was loaded. The jury found the defendant guilty of unlawful possession of a firearm and of unlawful possession of a loaded firearm. G. L. c. 269, § 10(a) & (n).

The defendant appealed, asking "**whether, to be convicted of unlawful possession of a loaded firearm, a defendant must know that the firearm he possessed was loaded**." The Commonwealth maintained that proof of such knowledge is not required. The Appeals Court disagreed.

**FIRST ISSUE: Does the Commonwealth have to prove the defendant, who unlawfully possessed a firearm, knew the firearm was loaded?**

The Appeals Court first examined the language of subsections (a) and (n) of G. L. c. 269, § 10, to determine whether the Commonwealth had to prove that the defendant knew the firearm was loaded. When reading G. L. c. 269, § 10(a), it is irrelevant whether the firearm was "loaded or unloaded," in order to trigger a violation. However, pursuant to G. L. c. 269, § 10(n), if the firearm that was knowingly and unlawfully possessed was loaded, then the defendant is subject to additional jail time. See *Commonwealth v. Dancy*, 90 Mass. App. Ct. 703, 705 (2016). Essentially, G.L. c. 269, § 10(n) is not a stand-alone crime, but serves as a sentencing enhancement provision that applies when someone violates §10(a) or § 10(c) "by means of a loaded firearm."

The Commonwealth argued that because §10(n) is not a stand-alone provision, then it does not require knowledge that the firearm was loaded. According to the Commonwealth's argument, it only must prove that a defendant knowingly possessed a firearm, not that he knew it was loaded.

**For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.**

Previously, the SJC ruled that knowledge would be a necessary element under G. L. c. 269, § 10(a), since the penalty is so severe. *Commonwealth v. Boone*, 356 Mass. 85 (1969). Based on this interpretation, the SJC stated that reading a knowledge element into the statute did not burden the Commonwealth, which already had to prove that the firearm was within the defendant's "control," and "knowledge is necessary to prove control." *Ibid.*

Similarly, the SJC held in *Commonwealth v. Jackson*, 369 Mass. 904 (1976), that the Commonwealth would have to prove that the defendant knew he was carrying a firearm. "The Legislature added an express knowledge requirement to G. L. c. 269, § 10(a), in the late 1990s, thus harmonizing the language of that subsection with existing case law." Despite the addition of the knowledge requirement to G. L. c. 269, § 10(a), the Legislature did not add such a requirement to G. L. c. 269, § 10(h). Nevertheless, in subsequently interpreting § 10(h), the SJC once again read a knowledge requirement into the statute. *Commonwealth v. Johnson*, 461 Mass. 44, 53 (2011) ("To convict the defendant of unlawful possession of ammunition pursuant to § 10(h), the Commonwealth was required to prove that the defendant knowingly possessed ammunition").

The *Johnson* case specifically concluded that unlawful possession of ammunition pursuant to G. L. c. 269, § 10(h), is a lesser included offense of unlawful possession of a loaded firearm pursuant to G. L. c. 269, § 10(a) & (n). *Commonwealth v. Johnson*, 461 Mass. at 52-53. **Because *Johnson* established that possession of ammunition pursuant to § 10(h) has to be "knowing," it necessarily follows that possession of that ammunition as part of the loaded firearm offense also has to be knowing.** Otherwise, § 10(h) would require an element (knowledge) that §§ 10(a) and 10(n) did not, and hence could not be a lesser included offense.

Although the SJC, subsequent to *Commonwealth v. Johnson*, suggested that whether the Commonwealth must prove knowledge that a firearm is loaded remains an open question, the holding of the earlier case already appears to have closed that door. See *Commonwealth v. Jefferson*, 461 Mass. at 828. "The Appeals Court stated it could not accept the Commonwealth's position in the present case, without holding that *Commonwealth v. Johnson* -- at least in part -- was wrongly decided, something that would be beyond our power as an intermediate appellate court." Accordingly, the Appeals Court found that to be convicted of unlawful possession of a loaded firearm, a defendant must know that the firearm he possessed was loaded.

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**SECOND ISSUE: Was there sufficient evidence to prove the defendant knew the gun was loaded?**

The Appeals Court concluded that the Commonwealth lacked sufficient evidence to prove the defendant knew the firearm was loaded. Although the SJC has stated that “where the firearm was a revolver located in a vehicle, a rational jury could infer that those who possessed the firearm knew that it was loaded with ammunition.” *Commonwealth v. Jefferson, supra*. However, the Appeals Court noted that this statement was made with respect to a revolver, a type of handgun that one might be able to tell was loaded merely by looking at the outside of the gun (because some of the bullets might be visible in the cylinder). The handgun in the present case was a pistol that relied on a magazine to feed bullets into the gun. As a result a person could not discern whether the gun was loaded merely by looking at it. Under the facts of this case, there was no basis where a rational juror could conclude beyond a reasonable doubt that the defendant knew the gun was loaded. The defendant therefore was entitled to a judgment of acquittal on the indictment that alleged unlawful possession of a loaded firearm.

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